J. N. T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 572

MINNIE KRANTMAN,

Petitioner,

vs.

LIBERTY LOAN CORPORATION, a Delaware Corporation, I. H. LEVY, D. J. HARRIS, DAVID B. LICHTENSTEIN, LYLE S. WOODCOCK and DAVID S. NERAD,

Respondents.

REPLY BRIEF OF PETITIONER.

IRWIN J. ASKOW
RICHARD JAMES STEVENS
BURTON H. YOUNG
Counsel for Petitioner

ASKOW AND STEVENS
BURTON H. YOUNG
7 South Dearborn Street
Chicago 3, Illinois

The Scheffer Press, Inc.—ANdover 3-6850

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REPLY BRIEF OF PETITIONER.

The two briefs in opposition to the Petition for Writ of Certiorari are replete with suggestions that the plaintiff purchased her shares of stock after the transactions in question and for the purpose of bringing the instant litigation. The decision of the trial court was *not* based on any such finding. Nowhere in the very extensive findings below is there any finding of fact that the plaintiff was not a stockholder at the time of the transaction in question, and none of the conclusions of law is that the

plaintiff is barred from recovery, either for failure to comply with Rule 23(b) or because she was not a stockholder at the time of the transaction. On the contrary, plaintiff was a stockholder at the time of the transactions in question. The merger and reclassification of stock was adopted by the stockholders at the meeting of November 3, 1954. (Apx. 54) The Employees' Stock Purchase Plan was subject to the approval of the stockholders, which occurred on November 3, 1954. (Apx. 49, 54) Final payment to the Levy group of the purchase price of 7241 Class B shares was made on February 25, 1955. (Apx. 4)

When plaintiff purchased her shares on September 16, 1954, through her attorney, who had handled her affairs since her husband's death, and who had been instructed by the plaintiff to invest her funds for her benefit (Apx. 18), neither she nor her attorney had any knowledge of the fraud being perpetrated on the stockholders. Such information was first received in the Proxy Statement issued on September 21, 1954 (Apx. 53), five days *after* the plaintiff purchased her stock.

THE EMPLOYEES' STOCK PURCHASE PLAN.

Respondents argue that the Class A shares issued under the Employees' Stock Purchase Plan were different from the other Class A shares, so that the price of the other Class A stock is no measure of the fair price of the Employees' Purchase Plan stock. The chief difference in the two Class A stocks is that the Employees' Purchase Plan shares carried full voting rights upon the payment of only 1/17th of the purchase price, $1.00 per share. These voting rights are particularly significant when the holders of this block of 93,600 shares retained voting control of the corporation after the issuance

of this stock. (Apx. 25) If the voting control existing in the 7500 Class B shares makes the Class B shares worth 13⅓ times more than the Class A shares, certainly the voting control existing in the 93,600 Employees' Stock Purchase shares issued to Lichtenstein and his nominees, makes those shares at least equal in value to the value of other Class A shares. Respondents claim the voting control of the corporation was worth $1,700,000 when it resided in the Class B shares. Therefore are not the 93,600 shares issued for $1.00 down to perpetuate working control in Lichtenstein (Apx. 25) worth far more than the other Class A shares?

Not one of the cases cited by the respondents involved a stock option or a stock purchase plan in any way similar to the Employees' Stock Purchase Plan here involved.

THE RECLASSIFICATION OF STOCK.

The cases cited by the respondents in connection with the reclassification of 7500 Class B shares to 100,000 common shares clearly recognize the rule that when the reclassification is so unfair as to amount to constructive fraud, the courts will act. (See *Bailey* v. *Tubize Rayon Corp.*, 56 F. Supp. 418 at 422; *MacFarlane* v. *North American Cement Corp.*, 16 Del. Ch. 172, 157 A. 396 at 400; *Barrett* v. *Denver Tramway Corp.*, 53 F. Supp. 198 at 201.)

In the case at bar, Liberty Loan Corporation was in no serious financial difficulty which required any radical changes in the capital structure. The obvious purpose for the reclassification was the issuance of 100,000 shares to the Lichtynstein group so they could recoup from the corporation the $1,700,000 spent in the purchase of the Class B shares, plus a profit. Admittedly, the new com-

mon stock gained technical voting control of the corporation by the reclassification. Yet, the new 100,000 shares issued to the former Class B stockholders (mainly Lichtenstein's group) when coupled with the 93,600 shares acquired by Lichtenstein and his nominees under the Employees' Stock Purchase Plan, firmly perpetuated the working control of Lichtenstein's group. (Apx. 25) Certainly the nominal change in voting control was not such as to entitle former Class B shareholders to 100,000 shares of stock with a total equity of $1,388,049 in exchange for the 7500 Class B shares with an equity of only $125,353. If this transaction does not constitute fraud such as to move a Court of Chancery to action, it is difficult to see what breach of fiduciary duty would so move the courts.

THE SALE OF CONTROLLING SHARES FOR AN EXCESSIVE CONSIDERATION.

Respondent Levy argues that the case at bar cannot come within the "looting" doctrine that the sellers are liable for the excessive consideration received by them when they know the purchasers intend to divert corporate assets to their own benefit. Levy's own testimony is that the reclassification of the 7500 B shares into 100,000 shares was discussed on May 26, 1954, well before the sale of Levy's B shares to the Lichtenstein group (Apx. 8). As Levy had actual knowledge that the purchasers intended to reclassify the 7500 B shares to 100,000 common shares, the case fits clearly within the "looting" doctrine.

It is respectfully submitted that it is perfectly apparent that the Court of Appeals did not consider and apply either the Delaware law or the law of any other jurisdiction, and that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

IRWIN J. ASKOW,
RICHARD JAMES STEVENS,
BURTON H. YOUNG,
Attorneys for Petitioner,
Minnie Krantman.

IRWIN J. ASKOW,
RICHARD JAMES STEVENS,
BURTON H. YOUNG,
7 South Dearborn Street,
Chicago 3, Illinois.